



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

REPLY TO  
ATTENTION OF

CECW-CO

OCT 29 2009

MEMORANDUM FOR MAJOR SUBORDINATE COMMANDS AND DISTRICT  
COMMANDS

SUBJECT: Water Quality Certification

1. Background. Section 401 of the Clean Water Act (CWA) requires any applicant for a Federal permit to conduct any activity that may result in a discharge into waters of the United States to provide a certification from the state in which the discharge will originate that any such discharge will comply with state water quality standards.

a. The CWA Section 404(b)(1) Guidelines state that a discharge of dredged or fill material cannot be permitted if "it causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard" (see 40 CFR 230.10(b)(1)).

b. Water quality is a public interest review factor discussed at 33 CFR 320.4(d). That section states that permit applications for activities that may "adversely affect the quality of waters of the United States are to be evaluated for compliance with applicable effluent limitations and water quality standards, during the construction and subsequent operation of the proposed activity." The evaluation should consider both point and non-point sources of pollution.<sup>1</sup> The state's certification of compliance with applicable effluent limitations and water quality standards will be considered conclusive with respect to water quality considerations, unless the Regional Administrator (RA) of the U.S. Environmental Protection Agency (U.S. EPA) notifies the district engineer of "other water quality aspects" that should be taken into consideration when making a decision on a permit application for an activity that results in a discharge of dredged or fill material into waters of the United States.

c. In cases where the state has issued water quality certification and the RA has not notified the district engineer of "other water quality aspects" that would render the state's certification "inconclusive" with respect to water quality considerations, as a general rule the district engineer should not deny the permit based solely on a finding that the proposed activity is "contrary to the public interest" with respect to water quality.<sup>2</sup>

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<sup>1</sup> It should be noted that Clean Water Act Section 208 attempts to address non-point sources of pollution by means of areawide waste treatment management plans.

<sup>2</sup> Note, however, that under 33 CFR 320.4(j)(4) in exceptional cases a district engineer can determine that "overriding factors of the public interest" justify denial or conditioning of a Corps permit to address water quality concerns even where the state has issued a Section 401 water quality certification and where the EPA RA has not asserted "other water quality aspects." Such an exceptional case might exist where the district engineer determines that the "concerns, policies, goals, and requirements as expressed in 33 CFR Parts 320-324, and the applicable

d. Regulatory Guidance Letter (RGL) 90-04 provides guidance for implementing the last sentence of §320.4(d). In cases where the U.S. EPA RA raises water quality concerns that are not addressed by the state water quality certification, the district engineer shall consider those water quality concerns as “other water quality aspects” under §320.4(d). The “other water quality aspects” may include water quality concerns outside the scope of the state certification, indirect impacts on water quality not addressed by the state certification, and water quality issues addressed in the state certification but regarding which the U.S. EPA has a different viewpoint.

e. When the U.S. EPA RA notifies the district engineer of “other water quality aspects” that need to be taken into consideration when making a permit decision, if the state has granted the Section 401 certification, that fact satisfies the requirements of Section 401 of the Clean Water Act, notwithstanding U.S. EPA’s stated concerns. The effect of the U.S. EPA RA’s letter is to render the granted state Section 401 certification “not conclusive” regarding water quality issues for that particular permit application, for purposes of the Corps public interest review and the Corps 404(b)(1) Guidelines analysis, as specified in 33 CFR 320.4(d).

2. Guidance. In cases where the U.S. EPA RA has notified the district engineer of “other water quality aspects” that need to be considered, the district engineer will not consider the state’s certification “conclusive” with respect to those water quality issues that have been specifically raised and documented by the U.S. EPA RA as problematic with respect to the particular permit application that is being addressed by the U.S. EPA RA’s letter. The district engineer will evaluate those particular water quality issues raised and documented by the U.S. EPA RA’s letter both for purposes of the Corps public interest review and regarding compliance with 40 CFR 230.10(b)(1). As part of that evaluation, the district engineer will conduct an objective, good-faith evaluation of water quality issues that have been raised and documented by the U.S. EPA RA’s letter.

a. When the U.S. EPA RA notifies the district engineer of “other water quality aspects,” the district engineer will fully consider those comments, and make an independent determination regarding water quality and compliance with 40 CFR 230.10(b)(1). The district engineer’s evaluation of the U.S. EPA RA’s comments regarding “other water quality aspects” must be discussed in the decision document for that permit action.

b. The district engineer may address “other water quality aspects” raised by the U.S. EPA RA by requiring project modifications to minimize adverse effects to water quality, or by adding

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statutes . . .” (e.g., the Clean Water Act) would justify permit denial or conditioning based on the Corps’ documented water quality concerns notwithstanding a favorable state determination expressed in an issued state Section 401 water quality certification. Given the fact that under 33 CFR 320.4(d) ordinarily a state’s Section 401 certification “will be considered conclusive,” the district engineer’s discretion to make exceptions to that general rule should be exercised rarely. In such an exceptional case the Corps should make every effort not to base its permit decision solely on water quality concerns, in the face of an issued state Section 401 water quality certification.

special conditions to the Department of the Army (DA) permit that require the implementation of supplemental water quality management measures. Requiring project modifications or conditioning the DA permit to require supplemental water quality management measures is at the district engineer's discretion, and may be necessary to ensure that the permitted activity is not contrary to the public interest and that it will comply with the 404(b)(1) Guidelines.

c. In cases where the district engineer proposes to require supplemental water quality management measures, he or she should provide the applicable U.S. EPA Region, the state certifying agency, and the permit applicant with an opportunity to review and comment on those supplemental measures. The district engineer should also coordinate with the agency administering the CWA §402 National Pollutant Discharge Elimination System permit program to ensure that appropriate conditions for monitoring downstream water quality are included in the §402 permit. The district engineer should not add special conditions to the DA permit that duplicate the conditions in the §402 permit.

d. If the district engineer requires supplemental water quality management measures beyond those required by the state certification, the district engineer must document the reasons for requiring those additional measures in the decision document for that permit. The district engineer's authority to require supplemental water quality management measures stems from the Clean Water Act and its objective of "restoring and maintaining the physical, chemical, and biological integrity of the Nation's waters."

e. The general mitigation policies at 33 CFR 320.4(r) can provide a basis for requiring project modifications or the implementation of supplemental water quality management measures. Permit conditions requiring supplemental water quality management measures must comply with 33 CFR 325.4. Permit conditions must be "directly related to the impacts of the proposal, appropriate to the scope and scale of those impacts, and reasonably enforceable" (see 33 CFR 325.4(a)).

3. Supplemental water quality management measures. Examples of supplemental water quality management measures that might be required as special conditions to DA permits to address "other water quality aspects" raised by the U.S. EPA RA include: the use of constructed wetlands to treat runoff and effluent from mines, urban areas, agricultural areas, or landfills before the runoff or effluent is released to receiving waters, and the establishment and maintenance of vegetated buffers next to wetlands and other waters. This is not intended to be an exhaustive list, and DA permits may be conditioned to require other types of water quality management measures to minimize adverse impacts to water quality and ensure compliance with the 404(b)(1) Guidelines.

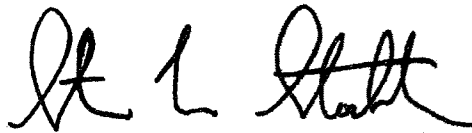
4. Monitoring and compliance. Supplemental water quality management measures required by DA permits may involve monitoring of downstream water quality to ensure that unacceptable adverse effects to water quality are not caused by activities that are regulated by the Corps and

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that are within the Corps' scope of analysis. When making a compliance determination for these cases, district engineers should consider whether there are other sources of pollutants in the watershed that may also be adversely affecting downstream water quality. For example, commercial and residential developments and other activities in the watershed may be contributing pollutants to downstream waters. As another example, runoff from roads may be another source of pollution that adversely affects downstream water quality. Compliance decisions need to take into account other sources of pollutants when determining whether non-compliance is occurring for permitted activities that require the implementation of supplemental water quality management measures.

FOR THE COMMANDER:

A handwritten signature in black ink, appearing to read 'S. L. Stockton', written in a cursive style.

STEVEN L. STOCKTON, P.E.  
Director of Civil Works